No. 89-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OWENS-CORNING FIBERGLAS CORPORATION, GAF CORPORATION, THE CELOTEX CORPORATION, CAREY CANADA, INC., EAGLE-PICHER INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., KEENE CORPORATION, FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., UNITED STATES GYPSUM COMPANY, W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, U.S. MINERAL PRODUCTS CO., PFIZER INC., GEORGIA PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., SOUTHERN TEXTILE CORPORATION, THE FLINTKOTE COMPANY, PITTSBURGH CORNING CORPORATION, TURNER & NEWALL, PLC, ASBESTOS CORPORATION, LTD., and PROKO INDUSTRIES, INC.,

Petitioners,

—v.—

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PAUL A. ZEVNIK*
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Attorneys for Petitioners

* Counsel of Record

August 31, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1890

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*

Petitioners,

—v.—

THE DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioners submit this reply in further support of their petition seeking this Court's review, on a writ of certiorari, of the decision of the District of Columbia Court of Appeals.

I. The District's Arguments Ignore the Circumstances Surrounding this Case and the Law in this Jurisdiction for More than a Century.

The underlying premise of the District of Columbia's opposition is that the evolution of the common law over the last century supports the lower court's sudden discovery of *nullum tempus* in the District of Columbia, which the panel erroneously denominates "municipal immunity." This portrayal, however, does not fairly depict the circumstances presented by this case. In December 1984, the District of Columbia brought an action for money damages based on alleged injury to real properties constructed in most cases several decades ago. After petitioners moved for summary judgment under the statute of repose and statute of

limitations—but before the trial court ruled—the District introduced and rushed through passage a piece of legislation creating *nullum tempus* immunity. D.C. Law 6-202. This *nullum tempus* legislation was properly struck down by the trial court as violative of due process and separation of powers. The trial court's rulings were certified for interlocutory appeal.

The central legal issue in this case was settled by this Court a century ago in *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889). *Metropolitan Railroad* rejected the very arguments presented here.[1] The District now contends that this lawsuit fits within a supposed "gap" in *Metropolitan Railroad* and that *Metropolitan Railroad* reflects outmoded nineteenth century jurisprudence. These arguments ring hollow because *Metropolitan Railroad* has never been questioned by either the District or the Court of Appeals prior to this case. And, the District's felt need to enact legislation creating immunity from the statutes of limitations and repose—even before the trial court ruled on petitioners' motions—speaks for itself.

In short, although the District now wants this Court to perceive a gradual weathering of the common law eventually to expose the nugget of non-sovereign "municipal" immunity, all in order to save its $400 million private lawsuit, that is not what took place. For more than a century, the concept of a common law municipal immunity belonging to the District was neither raised nor discussed in this city, despite the so-called "evolution" of the common law, and despite the fact that the District has been a party to tens of thousands of lawsuits in the past hundred years. In the century between *Metropolitan Railroad* and this case, the District never relied

---

1 One of the treatises cited in *Metropolitan Railroad* recognized that a number of jurisdictions applied the *nullum tempus* doctrine to exempt municipalities from limitations statutes. 2 J.F. DILLON, LAW OF MUNICIPAL CORPORATIONS § 674 (1881) (cited at Resp. Br. at 8-9 & n.9). Moreover, in *Metropolitan Railroad*, the District presented this Court with the very same argument that it relies upon here, *viz.*, that the District should be exempt from the statute of limitations when it performs a "public function."

upon the *nullum tempus* doctrine and consistently filed suits within the limitations period.

Rather, the lower court invented a common law non-sovereign "municipal" immunity in order to attempt to get around *Metropolitan Railroad* while at the same time avoiding the myriad complexities and manifest infirmities posed by the District's attempted self-creation of sovereign immunities through D.C. Law 6-202. The lower court compounded this error by refusing to rest any part of its holding on, or address the impact of, 1973 "Home Rule" legislation.

The suggestion that the petition should be denied because no "significant federal interest" is raised by either the legal or factual predicates for the petition is meritless. The sudden creation by the lower court of a newly-discovered and non-existent common law immunity in order to avoid constitutional questions emphasizes the importance of granting the petition and issuing the writ.

II. *Metropolitan Railroad* and Article I, Section 8 of the Constitution Are Significant Federal Interests.

The District rests its opposition on three incorrect premises: (i) that *Metropolitan Railroad* left "gaps" capable of being "filled" by the District of Columbia's courts; (ii) that an "evolving common law" permits the District of Columbia Court of Appeals to modify this Court's decisions; and (iii) that "metaphysical attributes of sovereignty," including Article I, § 8, cl. 17 of the United States Constitution, are not relevant in determining the nature and extent of the District of Columbia's privileges and immunities.

i. As respects the issue decided by the Court of Appeals, there was no "gap" left by *Metropolitan Railroad*. This Court could not have been more explicit: *nullum tempus* is a prerogative of the sovereign, and, because the District of Columbia is not a sovereign, it does not enjoy the benefits of *nullum tempus*. Nor may the District of Columbia's courts create a power or immunity where none has been explicitly created by Congress. *E.g.*, *Maryland & Dist. of Columbia Rifle & Pistol Ass'n v. Washington*, 294 F. Supp. 1166, 1167

(D.D.C. 1967), *aff'd*, 142 U.S. App. D.C. 375 442 F.2d 123 (D.C. Cir. 1971).

ii. As respects the District, the notion that there is a "common law" of immunities such as *nullum tempus*, or that the law of "sovereignty" and "sovereign immunities" may be "adapted to changed conditions and time"—absent a constitutional amendment—is incorrect. The doctrine of *nullum tempus* was recognized in England as early as the 17th century as a prerogative solely of the Crown.[2] A prerogative, where it exists, is an appurtenance to sovereignty. *Aetna Casualty & Sur. Co. v. Bramwell*, 12 F.2d 307, 309 (D. Or. 1926). Under English law, the term "prerogative" "can *only* be applied to those rights and capacities which the king enjoys *alone*, in contradistinction to others, and not to those which he enjoys in common with any of his subjects." *Id.*, quoting 1 W. BLACKSTONE, COMMENTARIES 239 (1766) (emphasis added). As a result of the Revolution, the powers of Parliament and the prerogatives of the Crown devolved upon the people of the states, and these powers remain with the people of the states, *except to the extent that they have been delegated to the federal government. Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854); *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). Under the Constitution, the sovereignty of the District has been passed to the federal government; accordingly, the prerogative of *nullum tempus* belongs to Congress, *not* to the District, as a matter of constitutional, not common, law. U.S. Const. art. I, § 8, cl. 17.

These "underpinnings" of *Metropolitan Railroad* remain unimpaired by the passage of time. *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), states plainly that "[t]he rule nullum tempus has never been extended to agencies or grantees of the local sovereign such as *municipalities*, county boards, school districts and the like." 304 U.S. at 135 n.3

---

2 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355 (1938).

(emphasis added).[3] *Guaranty Trust* further makes clear that *nullum tempus* immunity is applicable only to a sovereign. 304 U.S. at 133-34. Both the Court of Appeals and the District draw unwarranted comfort from an isolated and irrelevant passage of *Guaranty Trust* comparing monarchies with republican governments.[4]

iii. Under the Constitution, the District's sovereignty—or lack thereof—is scarcely "metaphysical." The Constitution carefully delimits the privileges and immunities of the federal government and its possessions, including the District of Columbia.[5] *See especially* U.S. Const. art. I, § 8, cl. 17. No decision of this Court since 1889 suggests that it views sovereignty or the doctrine of *nullum tempus* any differently, or, indeed, any differently than as expressed in *Metropolitan Railroad*. Neither *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), nor *Guaranty Trust Co., supra*, stands for the proposition that *nullum tempus* is available to non-sovereign units of government in general or municipal corporations in particular. *Kawananakoa* is not a *nullum tempus* case at all, but concerns the applicability of immunity from suit to the territory of Hawaii,[6] and *Guaranty Trust* reaffirms the princi-

---

3 The issue in *Guaranty Trust* was "[w]hether the benefit of [*nullum tempus*] should be extended to a foreign sovereign suing in a state or federal court," a question which the Court answered in the negative. 304 U.S. at 133, 136.

4 In the passage relied upon by the Court of Appeals and the District, this Court simply noted that Justice Story's "reference to the public policy supporting the rule that limitation does not run against a domestic sovereign as 'equally applicable to all governments' was obviously designed to point out that the policy is as applicable to our own as to a monarchical form of government, and therefore is not to be discarded because of its former identity with royal prerogative." 304 U.S. at 134.

5 THE FEDERALIST NO. 39 (J. Madison).

6 That the District would even cite *Kawananakoa* is itself revealing, given that the Court of Appeals ultimately accepted the District's argument below that immunity from suit should be distinguished from *nullum tempus* immunity, and thus " 'entirely different considerations apply.' " App. 30a (*quoting* District's Reply Brief at 21). The Court of Appeals examined the

ple that *nullum tempus* is *not* available to non-sovereign entities.

Indeed, the District's discussion of *Kawananakoa* is doubly misleading. *Kawananakoa* affirmatively distinguishes the territory of Hawaii in 1907—which, as the District concedes, had been entrusted by Congress with a broad grant of legislative authority—from the District of Columbia in 1907. In contrasting Hawaii and the District, this Court permitted Hawaii—but not the District—to have limited immunity from tort liability, because Hawaii possessed legislative power. The distinction recognized by *Kawananakoa* is that in the District of Columbia "the body of private rights is created and controlled by Congress and not by a legislature of the District." 205 U.S. at 354. The Constitution itself commands that "Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever over [the] District . . . ." U.S. Const. art. I, § 8, cl. 17. The District argues that it is saved by *Kawananakoa* because, since the enactment of "Home Rule" by Congress in 1973, "the District's legislative powers have closely resembled those of 1907 Hawaii." Resp. Br. at 12 n. 13. The flaw in this argument is that the Court of Appeals expressly declined to rest any part of its holding on the 1973 "Home Rule" legislation, App. 20a n. 25, recognizing, as it must, that sovereignty continues to be vested in Congress, not the District government. App. 22a.

In sum, the Court of Appeals did not provide any basis for deciding this case contrary to the principles set forth in *Metropolitan Railroad*, *Kawananakoa*, *Guaranty Trust*, and Article I, § 8, cl. 17. The writ should issue.

---

purposes of the two doctrines and concluded that cases concerning immunity from suit, including many of its own prior decisions, are inapposite. App. 29a-31a. Putting aside the inconsistency of the District's argument, the suggestion that "*Kawananakoa* [constitutes a] reformulation of the *nullum tempus* doctrine for non-sovereign entities," Resp. Br. at 12 n.13, stems from a fundamental misreading.

III. The Lower Court's Deprivation of Petitioners' Legal Defenses and Rights of Repose Without Due Process Also Warrants Review.

The Court of Appeals' finding, without discovery, trial or the opportunity to be heard, that petitioners' products "pose[ ] a pervasive and lethal threat to public safety" (App. 10a) does not merely result in this case going to trial; instead, it in effect deprives petitioners of the right to raise the statutes of limitations and repose as defenses.[7]

The Court of Appeals' determination that petitioners' products constitute a health hazard is anything but a "legal conclusion." The court strayed far from the record, basing its decision on highly controverted scientific studies that have little to do with the issues presented in this case. The Court of Appeals' reliance on these sources in its opinion demonstrate that the court's conclusion was based on factual, rather than legal, distinctions.[8] As such, petitioners have been deprived of a meaningful opportunity to confront adverse evidence. A court may not order the entry of judgment on an issue against a party without giving that party a chance to contest the facts material to the decision. *See Fountain v. Filson*, 336 U.S. 681 (1949).[9]

---

7 The Court of Appeals "conclude[d] that the District may bring an action for damages resulting from . . . contamination [by petitioners' products] even after the statutes of limitations and repose would ordinarily have run." App. 31a.

8 Respondent's reliance on Board of Educ. v. A, C & S, Inc., 131 Ill. 2d 428, 546 N.E.2d 580 (1989), is misplaced, as that case was before the court on defendants' motion to dismiss rather than on motion for summary judgment. Accordingly, plaintiff merely had to *plead* that defendants' products were harmful, rather than come forward with affirmative evidence. The opinion of an intermediate appellate court in Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, *rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987), represents the minority view regarding *nullum tempus*. Moreover, the North Carolina court was not bound by this Court's decision in *Metropolitan Railroad*.

9 In *Fountain*, this Court reversed a judgment of the United States Court of Appeals for the District of Columbia Circuit under circumstances

The Court of Appeals' ruling effectively removes petitioners' opportunity to contest whether their products pose a danger to public safety and, under the Court of Appeals' newly-fashioned standard of *nullum tempus* immunity, thereby defeats petitioners' ability to raise the statutes of limitations and repose as a bar. A right to an existing defense is a property right protected by the due process clause of the Fifth Amendment. *See Pritchard v. Norton*, 106 U.S. 124 (1882). The court below could have, and should have, avoided reaching decisions on disputed issues until the appellate record provided a basis for making such determinations.[10] Its failure to follow the required procedure of remanding the case to the lower court for further factual findings when the appellate record is insufficient merits, at minimum, reversal and remand.

As respects petitioners' due process claim relating to D.C. Code § 12-310, the difference between statutes of limitations and statutes of repose is anything but "metaphysical." The distinctions between the two types of statutes—and the rights afforded by them—are detailed in the petition at pp. 19-21 and have been recognized on numerous occasions by courts throughout the country, including the District of Columbia Court of Appeals. *Sandoe v. Lefta Assocs.*, 559 A.2d 732 (D.C. 1988); *President of Georgetown College v. Madden*,

---

similar to those presented here. The district court had granted summary judgment for defendant, but on review the Court of Appeals remanded the case to the trial court with instructions to enter judgment for plaintiff based on an issue on which defendant "had no opportunity to present a defense." 336 U.S. at 683. This Court reversed the Court of Appeals, holding that "it was error for it to deprive [defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her." *Id.*

10 The Court of Appeals' belated addition of a footnote cautioning the District that it may not rely on its opinion regarding the health hazards posed by petitioners' products at trial does not solve the problem, but instead underscores the court's error. Granting summary judgment in favor of the District on the basis of the "alleged" threat is improper unless there is no genuine issue of material fact in dispute. The added footnote calls attention to the fact that the court itself recognizes the existence of disputed issues of material fact with respect to the alleged hazards at issue in this case.

505 F. Supp. 557 (D. Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981); *Commonwealth v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 385 S.E.2d 865 (1989); *School Bd. v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).[11]

This Court should grant review to correct the erroneous application of *nullum tempus* and the resulting derogation of petitioners' vested right to repose.

IV. There Is No Reason To Delay Review Until After Trial.

The District suggests that the writ should not issue because petitioners may proceed to trial, albeit *sans* defenses that could pertain to over eighty percent of the claimed damages. The decision below was a final determination of the questions presented in the petition. The disposition reached by the Court of Appeals effectively precludes further consideration of the limitations and repose issues until after substantial discovery and time-consuming and expensive proceedings. There is no reason to delay review. The lower court's decision satisfies this Court's approach to the question of "finality" for purposes of review under 28 U.S.C. § 1257, which permits this Court to review judgments of the District of Columbia Court of Appeals. *See Bradley v. School Bd.*, 416 U.S. 696, 722-23 (1974); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (the requirement of finality has been given a "practical rather than technical construction"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

---

11 Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), and Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953), are inapposite. Both cases held that federal courts, sitting in diversity, could constitutionally apply their own statutes of limitations where the substantive law of another state applied. Neither case sheds any light on whether a court may abrogate the vested rights afforded by the statute of repose by application of the *nullum tempus* doctrine.

CONCLUSION

For the foregoing reasons, this Court should issue the requested writ of certiorari.

Respectfully submitted,

WILLIAM L. GARDNER
THOMAS J. O'BRIEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

Counsel for United States Gypsum Company

PAUL A. ZEVNIK*
PETER C. CONDRON
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Counsel for GAF Corporation

Of Counsel:

John F. Mahoney, Jr.
Mahoney, Hogan, Heffler & Heald
777 14th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 347-6161

Counsel for Owens-Corning Fiberglas Corporation

Drake C. Zaharris
Parks, Hansen & Ditch
Mercantile Towson Building
Suite 1012
409 Washington Avenue
Towson, Maryland 21204
(301) 821-6350

Counsel for The Celotex Corporation and Carey Canadian

Richard J. McMillan
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

Counsel for Eagle-Picher Industries

Kevin C. McCormick
Whiteford, Taylor & Preston
Suite 1400
Seven St. Paul Street
Baltimore, Maryland 21202
(301) 347-8700

Counsel for Armstrong World Industries

Quentin R. Corrie
Anderson & Quinn
Suite 370
12450 Fair Lakes Circle
Fairfax, Virginia 22033
(703) 222-2200

Counsel for Keene Corporation

John A. Sutherland, Jr.
Siciliano, Ellis, Dyer
& Boccarosse
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692

Counsel for Fibreboard Corporation

Edward J. Lopata
Dwight D. Murray
Jordan, Coyne, Savits
& Lopata
1030 15th Street, N.W.
Washington, D.C. 20005
(202) 371-1800

Michael Quinn
Cahill Gordon & Reindel
1990 K Street, N.W.
Washington, D.C. 20006
(202) 862-8900

Counsel for W.R. Grace & Company

William Clague
Lennox Cooper
Bastian, Clague & Clancy
4701 Sangamore Road
Bethesda, Maryland 20816
(301) 320-5500

Counsel for U.S. Mineral Products Company

Thomas S. Schaufelberger
Drinker, Biddle & Reath
901 15th Street, N.W.
Washington, D.C. 20005
(202) 842-8800

Counsel for Georgia-Pacific Corporation

Steven D. Cundra
Rochelle Hindman
Thompson, Hine & Flory
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Counsel for The Flintkote Company

Timothy J. Bloomfield
Dunnells, Duval & Porter
2100 Pennsylvania Avenue
Washington, D.C. 20037
(202) 861-1400

Counsel for Pittsburgh-Corning Corporation

Charles E. Dorkey III
Thomas I. Sheridan III
Richards & O'Neil
885 Third Avenue
New York, New York 10022

Wyatt B. Durrette, Jr.
Bradley B. Cavedo
Durrette, Irvin & Lemons, P.C.
600 Main Street
Twentieth Floor
Richmond, Virginia 23219
(804) 780-0505

Counsel for Turner & Newall, PLC

John Calender
Kathryn Kusske
Clifford & Warnke
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 828-4248

Counsel for Owens-Illinois, Inc.

Arlene Fickler
Hoyle, Morris & Kerr
1424 Chestnut Street
Philadelphia, Pennsylvania 19102
(215) 981-5700

Counsel for National Gypsum Company

Charles R. Bruton
Rolin P. Bissell
Schnader, Harrison, Segal & Lewis
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2686

Counsel for Pfizer Inc.

Charles E. Gallagher, Jr.
O'Malley, Miles & Harrell
99 Commerce Place
P.O. Box 900
Upper Marlboro, Maryland 20773
(301) 350-1300

Counsel for Asbestos Corporation Limited

Nancy E. Gregor
Gertrude C. Bartel
Kramon & Graham
Sun Life Building
Charles Center
Baltimore, Maryland 21201
(301) 752-6030

Counsel for H.K. Porter Company, Inc. and Southern Textile Corporation

Counsel for Petitioners

August 31, 1990

*Counsel of Record